

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: July 19, 2011

TO: Jonathan B. Kresiberg, Regional Director
Region 34

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Martin House 506-0170
Case 34-CA-12950 506-2001-5000

The Region submitted this Section 8(a)(1) case for advice as to whether the Employer unlawfully discharged the Charging Party for inappropriate Facebook posts that referenced to the Employer's mentally disabled clients. We conclude that the Employer did not unlawfully discharge the Charging Party because she was not engaged in protected concerted activity.

FACTS

Martin House (the Employer) is a non-profit residential facility for homeless people. Many of the Employer's clients suffer from mental illness and substance abuse. In May 2010, the Employer received a grant to develop a new residential program, designed for residents who have more significant mental health issues. The Charging Party was employed initially in April 2007 as a part-time residential assistant and in May 2010 became a full-time recovery specialist in the new program.

On January 27, 2011,¹ the Charging Party engaged in the following "conversation" on her Facebook wall, while working on the overnight shift.

Charging Party: Spooky is overnight, third floor, alone in a mental institution, btw Im not a client, not yet anyway.

Friend 1: Then who will you tell when you hear the voices?

¹ All dates are in 2011 unless otherwise noted.

Charging Party: me, myself and I, one of us had to be right, either way we'll just pop meds until they go away! Ya baby!

Charging Party: My dear client ms 1 is cracking up at my post, I don't know if shes laughing at me, with me or at her voices, not that it matters, good to laugh

Friend 1: That's right but, if she gets out of hand, restrain her.

Charging Party: I don't need to restrain anyone, we have a great rapport, im beginning to detect when people start to decompensate and she is the sweetest, most of our peeps are angels, just a couple got some issues, Im on guard don't worry bout a thing!

Friend 2: I think you'd look cute in a straitjacket, heh heh heh ...

Neither of the commenting "friends" were coworkers; in fact, the Charging Party admitted that she is not "Facebook friends" with any of her coworkers.

The Charging Party is "Facebook friends," however, with one of the Employer's former clients, who saw the postings and called the Employer to report her concern. As a result, when the Charging Party reported for work on January 31, she was handed a termination letter. That letter referenced the phone call that the Employer had received from its former client and quoted the Charging Party's January 27 Facebook posts. The letter went on to state, in relevant part, that "[w]e are invested in protecting people we serve from stigma" and it was not "recovery oriented" to use the clients' illnesses for her personal amusement. The letter also cited confidentiality concerns raised by her disclosing information about clients to others. Moreover, the Employer noted that her posts were entered on work time when she should have been performing work-related duties.

ACTION

We conclude that the Employer did not violate Section 8(a)(1) because the Charging Party did not engage in any protected concerted activity.

The Board's test for concerted activity is whether activity is "'engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.'" ² The question is a factual one and the Board will find concert "[w]hen the record evidence demonstrates group activities, whether 'specifically authorized' in a formal agency sense, or otherwise[.]" ³ Thus, individual activities that are the "logical outgrowth of concerns expressed by the employees collectively" are considered concerted. ⁴ Concerted activity also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action" and where individual employees bring "truly group complaints" to management's attention. ⁵

Here, there is no evidence of protected concerted activity. The Charging Party did not discuss her Facebook posts with any of her fellow employees, and none of her coworkers responded to the posts. Moreover, the Charging Party was not seeking to induce or prepare for group action, and her activity was not an outgrowth of the employees' collective concerns. In fact, her Facebook posts did not even mention any terms or conditions of employment. The Charging Party was merely communicating with her personal friends about what was happening on her

² *Meyers Industries*, 281 NLRB 882, 885 (1986) (*Meyers II*), *aff'd sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988).

³ *Id.* at 886.

⁴ *See, e.g., Five Star Transportation, Inc.*, 349 NLRB 42, 43-44, 59 (2007), *enforced*, 522 F.3d 46 (1st Cir. 2008) (drivers' letters to school committee raising individual concerns over a change in bus contractors were logical outgrowth of concerns expressed at a group meeting).

⁵ *Meyers II*, 281 NLRB at 887.

shift. Accordingly, she was not discharged in violation of Section 8(a)(1), and the Region should dismiss the charge, absent withdrawal.⁶

B.J.K.

⁶ In the absence of any evidence of protected concerted activity, it is unnecessary to reach the issue of whether the Charging Party's comments about the Employer's clients rendered otherwise protected activity unprotected.